20/6

FILED
MAY 26 1956
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

No. [redacted].117

OCTOBER TERM, 1955.

WALLACE H. TOMLINSON,
Petitioner,

vs.

FORD MOTOR COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Sixth Circuit.

THEODORE T. SINDELL,
526 Standard Building,
Cleveland, Ohio,
Attorney for Petitioner.

SINDELL, SINDELL & BOURNE,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-8847

TABLE OF CONTENTS.

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statutes Involved 2

Statement 3

Reasons for Granting the Writ 6

Conclusion 10

APPENDIX:

Opinion of District Court on Motion for Judgment or for New Trial 11

Opinion of the United States Court of Appeals for the Sixth Circuit 13

Judgment of the United States Court of Appeals for the Sixth Circuit 26

Order of the Court of Appeals Denying Rehearing 26

TABLE OF AUTHORITIES.

Cases.

Bosjnak v. Superior Sheet Steel Co., 145 Ohio St. 538, 62 N. E. 2d 305 (1945) 6

Campbell v. Hughes Provision Co., 87 Ohio App. 151, 94 N. E. 2d 273 (1949) 9

Kresge Co. v. Holland, 158 F. 2d 495 (6th Circ. 1946) 9

Scheibel v. Lipton, 156 Ohio St. 308, 102 N. E. 2d 453 (1951) 6

Schwarz v. General Electric Realty Corp., 163 Ohio St. 354, 126 N. E. 2d 906 (1955) 6, 7, 8

Texts.

Prosser, Torts, pp. 642-44 (1941 ed.) 6

Restatement, Torts, sec. 343(c) 6

Statutes.

Ohio Revised Code:

Section 4101.11 ..... 2, 7

Section 4101.12 ..... 2, 7

28 U. S. C. 1254(1) 2

Federal Rules of Civil Procedure.

Rule 51 9

In the Supreme Court of the United States

No. . . . . .

OCTOBER TERM, 1955.

WALLACE H. TOMLINSON,
Petitioner,

vs.

FORD MOTOR COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cause on February 11, 1956.

OPINIONS BELOW.

The charge to the jury given in the United States District Court for the Northern District of Ohio, Eastern Division, is unreported but appears in the Record at 62a to 77a. (Appellant's appendix in the Court of Appeals.) The trial court's opinion denying defendant's motion for judgment notwithstanding the verdict or for a new trial is unreported but is reproduced in the Appendix hereto, pp. 11-12, *infra.* The opinion of the Court of Appeals is reported at 229 F. (2d) 873 and is reproduced in the Appendix hereto, pp. 13-26, *infra.*

JURISDICTION.

The opinion of the Court of Appeals was entered on February 11, 1956 (R. 36b). A timely petition for rehearing was filed on March 2, 1956, and denied on March 14, 1956 (R. 38b). This Court's jurisdiction rests on 28 U. S. C. 1254(1).

QUESTION PRESENTED.

Whether the United States Court of Appeals, contrary to the law of Ohio and contrary to the law of every other jurisdiction, may rule that a landowner in control of his premises has no duty to exercise ordinary care in maintaining his premises in a safe condition, and is *necessarily* free from liability for injuries to business visitors which result from the landowner's active negligence, simply because the unsafe condition created by the owner is not hidden.

STATUTES INVOLVED.

Ohio Revised Code Sections 4101.11 and 12:

"4101.11. Every employer shall furnish employment which is safe for the employees engaged therein, shall furnish a place of employment which shall be safe for the employees therein and for frequenters thereof, shall furnish and use safety devices and safeguards, shall adopt and use methods and processes, follow and obey orders, and prescribe hours of labor reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters."

"4101.12. No employer shall require, permit, or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide, and use safety

devices and safeguards, or fail to obey and follow orders or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe. No employer shall fail to do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees or frequenters. No such employer or other person shall construct, occupy, or maintain any place of employment that is not safe."

STATEMENT.

Petitioner was an employee of an independent contractor hired to paint portions of a new plant, owned by the respondent Ford, which was then in the process of being constructed and under its control. On the second day of his work there (R. 14b), while standing on a suspended platform to paint certain overhead sprinkler pipes, petitioner was severely and permanently injured when a dump truck operated by an employee of another contractor was driven under the scaffold in a raised (i.e. dumping) position and snagged a loop of rope hanging below the scaffold (R. 33a). Petitioner and a fellow worker fell some sixteen feet, and petitioner suffered fractured ribs, fractured vertebrae, and a punctured lung (R. 68a). The injuries were not contested.

After an extensive trial, in which considerable conflicting testimony was presented, the District Judge gave careful and complete instructions to the jury (R. 62a). He first reviewed the testimony of the eighteen witnesses and then set forth the guiding legal principles to which they should apply the facts as they found them to be. Under his charge, the respondent Ford could be found liable *only if* (1) Ford retained and exercised the right of "control and coordination of the work of the contractors," (2) Ford had failed "to exercise ordinary care" in "fur-

nishing a reasonably safe place to work" by directing that the flooring contractor work with a dump truck in the same small area as the painting contractor worked with a suspended scaffold, and by failing to foresee the risk involved therein, (3) after creating such a dangerous situation, Ford had failed to exercise care in giving adequate "warning or instruction" to the paint contractor's workmen or in taking "some safety measures * * * respecting the dangers reasonably to be foreseen if ropes from the scaffold should hang too far down while the hoist truck was dumping blocks for flooring in the same area at the same time," and (4) the injuries were the proximate result of such a failure to exercise due care, if any, either by Ford alone or by Ford jointly with others (R. 62a to 77a).

The District Judge's charge made it perfectly clear that Ford was not an insurer of petitioner's safety and that Ford was not responsible for the negligence of its independent contractor (R. 64a). The Court also instructed the jury that petitioner's suit would be barred if he, himself, had failed to exercise reasonable care for his safety (R. 65a). Although Ford moved for a directed verdict (R. 60a) and submitted two proposed charges (R. 61a) and excepted to certain other portions of the general charge as given (R. 77a), it indicated no discontent and suggested no variation in the portion of the charge relating to the question whether sufficient warning or instruction had been given to the painters or whether sufficient safeguards had been taken to avoid the type of accident on which this suit is premised. The jury returned a general verdict for petitioner for $13,500.00.[1]

---

[1] The Court had instructed the jury to reduce any award to the plaintiff by $13,500.00 since plaintiff had received that amount

(Continued on next page)

Ford then filed a motion in the District Court to set aside the jury's verdict and to enter judgment for Ford or to order a new trial (R. 78a). That motion was denied with an opinion by the District Court which concluded that "the defendant had a fair trial and reasonable minds well could have found as the jury did on the negligence question submitted" (Appendix hereto, p. 12, *infra*).

Ford then sought to upset the jury verdict on appeal to the Court of Appeals on the ground, *inter alia*, that "even if all factual issues are resolved in favor of the plaintiff" (R. 36b) it owed no duty to petitioner to try to make the premises safe or to apprise him of the danger, because petitioner could have observed that the flooring contractor was working in that area—regardless of the fact that the dangerous condition was found by the jury's verdict to have resulted from Ford's own negligence, and regardless of whether petitioner was ignorant of the possibility that a raised dump truck would be used or appreciated the risk involved therein. The Court of Appeals accepted this contention and remanded the case with instructions to enter judgment for the respondent Ford (R. 34b). In so doing the Court of Appeals concluded that under Ohio law, which governs this diversity of citizenship suit, a landowner has no duty to employees of independent contractors working on his property except to warn of hidden dangers (Appendix hereto, p. 24, *infra*).

(Continued from preceding page)

from others, who might have been found jointly liable, in exchange for a covenant not to sue. The jury presumably assessed petitioner's injuries at $27,000.00, which the District Judge characterized as "extremely moderate considering the nature of the accident and the seriousness and extent of the plaintiff's injuries." (R. 75a, 76a.)

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals in the instant case not only contravenes the clearly established law of Ohio, whose rulings the Court of Appeals purported to follow, but it suggests as the Ohio rule a principle which is wholly inconsistent with fundamental hornbook law as it is applied in other common law jurisdictions. It is, therefore, respectfully submitted that this is an appropriate case for the exercise of this Court's general supervisory power over the federal Courts, to rectify a patently unjust result and to eliminate the present difference between the tort law applied by this Court of Appeals which reviews federal diversity cases arising in Ohio, and the established Ohio principles in that same area.

1. In Ohio, as elsewhere, an employee of an independent contractor hired by a landowner to make repairs on the landowner's premises is a business visitor or invitee. *Schwarz v. General Electric Realty Corp.*, 163 Ohio St. 354, 126 N. E. 2d 906 (1955); *Bosjnak v. Superior Sheet Steel Co.*, 145 Ohio St. 538, 62 N. E. 2d 305 (1945).

The duty of care owed to such a business visitor by the landowner involves a dual obligation: (1) The landowner must exercise ordinary care to make the premises safe for the performance of such business, and (2) the landowner must exercise ordinary care to warn of any dangerous condition of which he has knowledge or should have knowledge in the exercise of ordinary care. *Bosjnak v. Superior Sheet Steel Co., supra*; see also, *Prosser, Torts*, pp. 642-44 (1941 ed.); *Restatement, Torts*, sec. 343(c). It is the former of these two obligations which most significantly differentiates the landowner's duty to an invitee from that owed to a mere licensee. Cf. *Scheibel v. Lipton*, 156 Ohio St. 308, 102 N. E. 2d 453 (1951).

In Ohio, as in most other jurisdictions, each of the obligations due to an invitee is subject to certain reservations. The duty to provide a safe place to work does not apply to dangers which are necessarily inherent in the work. *Schwarz v. General Electric Realty Corp.*, 163 Ohio St. 354, 126 N. E. 2d 906 (1955). And the duty to warn of dangerous conditions does not apply to situations where the invitee has full knowledge of the danger so that he should fully appreciate the risk involved. *Schwarz v. General Electric Realty Corp., supra.*

The common law duty toward invitees was codified in Ohio for employees and "frequenters" of the place of employment in Ohio Revised Code, Sections 4101.11 and 4101.12 (set forth in full in the opinion of the Court below, *infra*, App. p. 16). As the Court of Appeals expressly acknowledged, that statutory duty to "furnish a place of employment which shall be safe for the employees therein and for frequenters thereof" cannot be said to establish a lower duty for a landowner toward business invitees than the common law obligation discussed above. The Court of Appeals ruled, however, that the instant landowner had no duty to exercise ordinary care in maintaining the premises in a safe condition for the performance of petitioner's work. Indeed, the Court below concluded that the respondent was not responsible for injuries resulting from its own active negligence, as found by the jury in reaching its verdict, when it scheduled the flooring contractor to work at the same time and place as the painters were working on suspended scaffolds.

The primary authority relied upon by the Court of Appeals was the decision of the Supreme Court of Ohio in *Schwarz v. General Electric Realty Corp.*, 163 Ohio St. 354, 126 N. E. 906 (1955). In that case an employee of an independent contractor was injured, while constructing

steel beams directly under a high voltage line on the defendant's property, as the result of negligence of the contractor's crane operator in permitting one of the beams to contact the high voltage line. The Court pointed out that to the extent the presence of the high voltage line prevented this from being a safe place to work, the danger was necessarily inherent in the work. Since there was no showing that defendant had failed to exercise reasonable care in otherwise maintaining the premises in a safe condition, the only basis for liability would be a failure to give adequate warning. And the Court there concluded that in the circumstances of that case, adequate warning of the danger had been given to the injured man, both directly and by giving warning to the contractor. The result in the *Schwarz* case has no relevance to the instant suit unless it is to establish that this jury verdict should have been upheld. In the instant case the injuries were found to have been caused by the landowner's own negligence rather than the negligence of an independent contractor. Here the dangerous condition was not necessarily inherent in the nature of the invitee's work as the Ohio Court found in the *Schwarz* case.

Thus, the decision of the Court of Appeals in this case wholly ignored a controlling facet of Ford's duty to the petitioner (its duty to provide a safe place to work), which establishes beyond question the propriety of the jury verdict for petitioner.

2. Moreover, even if Ford's duty to petitioner were limited to apprising him of the nature and extent of the risk involved in his work, the ruling of the Court of Appeals was wholly unwarranted. It is, of course, fundamental to tort law generally that knowledge of a dangerous situation is not sufficient to excuse the negligence which created that danger unless all significant elements of the

risk involved are fully appreciated. *S. S. Kresge Co. v. Holland,* 158 F. 2d 495 (6th Circ. 1946); *Campbell v. Hughes Provision Co.,* 87 Ohio App. 151, 94 N. E. 2d 273 (1949).

The District Judge's charge to the jury submitted the question of the adequacy of the warning to the jury. Certainly there was more than adequate evidence to support a finding that the warning was inadequate, even though petitioner could see that the flooring contractor was working in the same area, because there was no evidence that anyone sought to advise him that the dump truck used by the flooring contractor might be raised for dumping in that area or driven about in a raised position. This was an appropriate question for the jury, and the evidence which supports a finding of inadequate warning likewise supports the verdict.

Moreover, the fact that the jury did not find that petitioner's suit was barred by contributory negligence further demonstrates that the warning was inadequate, since he would not have exercised due care for his own safety if he had permitted a rope to hang below the scaffold with knowledge that a truck might well snag such a rope.

Nor could Ford complain that the District Judge's charge permitted a finding of negligence on either of two grounds because one ground is allegedly improper (i.e. failure to give adequate warning or failure to maintain the premises safe for petitioner). No objection to the form or language of this portion of the charge was made at the trial, and no conflicting requested charge was submitted. In such a situation, Rule 51 of the Federal Rules of Civil Procedure clearly bars any challenge to the charge after the jury has returned its verdict.

CONCLUSION.

It is respectfully submitted, therefore, that this petition for a writ of certiorari should be granted. And, because the error of the ruling of the Court of Appeals in setting aside the verdict and judgment for petitioner is clear from the opinion below itself, petitioner respectfully submits that this is a proper case for summary disposition by this Court without further briefing or argument.

Respectfully submitted,

THEODORE T. SINDELL,
526 Standard Building,
Cleveland, Ohio,
Counsel for Petitioner.

SINDELL, SINDELL & BOURNE,
Of Counsel.

APPENDIX.

OPINION OF DISTRICT COURT ON MOTION FOR JUDGMENT OR FOR NEW TRIAL.

(Filed June 14, 1954.)

JONES, J.:

This case required more than two weeks to try, largely due to the fact that there were three defendants in it the greater part of the time whose interests were not common except that they each denied joint or several liability to the plaintiff and therefore each had its own counsel conducting examinations of witnesses.

Every question now urged for judgment or a new trial was presented, argued, carefully considered and decided during the course of the trial.

The defendant had the benefit of every favorable instruction to which it was believed to be entitled under the limited issue submitted to the jury as to its liability. That Ford retained effective control and direction over all the construction work performed by contractors, as well as sub-contractors, is abundantly evidenced by the extensive reservations made in its prime contract with Ferguson.

Under the more effective evidence the defendant Ford Company exercised its reserved control and direction by ordering two sub-contractors to work in the same area, one above the other; the floor layers on the ground, the painters of the automatic sprinkler system pipes overhead. Bringing these two sets of employees together in such manner was in Ford's interest, to speed up the work for its own occupancy of the space. That is the clear implication to be derived from a fair analysis of the evidence.

Rather than quote portions of the court's charge out of context as to the position taken in response to defendant's motions and exceptions, reference is made to the complete charge of the court as well as to the precise limits of legal obligation placed upon Ford.

Submission of issues under Sections 4101.11 and 4101.12 of the Ohio Code is challenged upon the ground that those statutes are not applicable to employers like

Ford under the facts in this case. There is evidence that Ford had employees working in and about the area where the accident occurred,—guards, watchmen and others, preparing places for the storage and installation of Ford's equipment. Unless these Ohio statutes apply to "frequenters" such as the plaintiff as an employee of a sub-contractor doing work under the reserved direction and control of Ford, they could have no present force in any given case.

They would have no consequential application to employees of employer Ford since under the Workmen's Compensation Act of Ohio the Industrial Commission would make awards to injured employees of employer Ford without regard to compliance with the obligations of such statutes.

I think the liability of Ford well might extend beyond the limited and favorable instruction given to the jury and be held for primary as well as joint negligence under reasonably conceivable and foreseeable circumstances.

The defendant had a fair trial and reasonable minds well could have found as the jury did on the negligence question submitted. Finding for the plaintiff as it did, the verdict is extremely moderate considering the nature of the accident and the seriousness and extent of the plaintiff's injuries.

The citation in defendant's brief of language used in chambers by the court in attempting to assist the parties in comprising and settling the case, is not an appropriate reference as a judicial finding, and is disapproved.

Motion for judgment or for new trial will be denied.

JONES,

United States District Judge.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed February 11, 1956.)

Before ALLEN, MILLER and STEWART, Circuit Judges.

STEWART, Circuit Judge. In this diversity of citizenship case Wallace H. Tomlinson was awarded damages by a district court jury for personal injuries he sustained while working as a painter in a plant under construction on the defendant Ford Motor Company's property near Cleveland, Ohio.[1] The plaintiff was an employee of an independent painting contractor at the time he was injured. Even if all factual issues are resolved in favor of the plaintiff, the defendant contends it is not liable for his injuries under the law of Ohio, and that the district judge was in error in submitting the case to the jury.

Ford was the owner of land on Brook Park Road near Cleveland, upon which it undertook to have a new engine plant constructed. For this purpose it let a number of prime contracts for various phases of the work. There was no general contractor, as such. Ford itself performed many of the traditional functions of a general contractor, reserving in its prime contracts the power to coordinate, schedule and approve work in progress. The H. K. Ferguson Company was the prime contractor for the erection of the superstructure. That company in turn let some twenty subcontracts to other independent contractors, among them a subcontract with Automatic Sprinkler Corporation of America to install an overhead sprinkler system and another subcontract with Jennison-Wright Corporation to lay wood block flooring. Automatic Sprinkler in turn subcontracted with Long Painting Company to paint the sprinkler system. The plaintiff was in Long's employ on August 6, 1951, when he was injured.

On that day the plaintiff and another Long painter, standing on a scaffold sixteen feet above the floor, were

---

[1] The parties will be denominated as in the court below, and the defendant Ford Motor Company will sometimes hereinafter be referred to as "Ford."

engaged in painting the sprinkler pipes. It was their second day on the job. The scaffold rested on trusses and cables which had been erected as part of the structural steel work, and ropes were tied to each end of the scaffold to enable it to be pulled into new position as the painting progressed. These ropes were coiled up at each end of the scaffold, leaving a loop between the coil and the point where the rope was tied to the scaffold at each end, each loop extending downwardly a distance of some three to five feet.

While the painting work was in progress overhead, the employees of Jennison-Wright were installing wood block flooring in the same area of the plant. The wood blocks were brought to the place where they were needed in the plant area by a dump truck. This truck was operated and owned by Alfonso Ruffin, who had been hired by Jennison-Wright on an hourly basis. As the work progressed, Ruffin was told by the Jennison-Wright employees where to dump each load of wood blocks.

While the plaintiff and his fellow worker were thus engaged in painting the sprinkler pipes above, Ruffin's dump truck was, at the direction of the Jennison-Wright employees, spotted in a position not far from a point directly below one end of their scaffold. In order to unload the wood blocks, Ruffin raised the dump body to its maximum height of nearly thirteen feet above the floor level and moved the truck forward quickly. The truck's elevated body snagged the loop of rope hanging from the end of the scaffold, pulled the scaffold down and caused the plaintiff to fall to the floor.

No Ford employee and no equipment or vehicle belonging to Ford were directly involved in the immediate sequence of events leading to the plaintiff's injuries. There was evidence however, that Ford plant guards were present in the general area, and that some Ford property had already been moved into the plant for installation or storage not far from the site of the plaintiff's injuries. While the evidence was in conflict as to who had arranged for the sprinkler painting and floor laying operations to proceed

simultaneously in the same area of the plant, there was sufficient evidence to support a finding that it was Ford which had done so under the powers reserved to it in its prime contract with Ferguson.

The undisputed evidence showed that Long's general foreman had been present when the painting job was commenced on the previous day and had observed the floor work in progress in the same area of the plant where the painting work was to be done. The foreman observed that the work of laying the floor was proceeding from a northerly to a southerly direction, and he ordered the plaintiff and his co-worker to work from a southerly to a northerly direction in painting the overhead sprinkler system. The foreman gave no warning to the plaintiff or his fellow worker of any danger involved in the simultaneous carrying on of the painting and the floor laying in the same area of the plant. The plaintiff himself knew the floor laying work was going on, and had noticed a dump truck at least once during the day and a half he had been on the job before the accident, but the dump body of the truck was not elevated at the time he observed it.

This action for damages was originally filed by the plaintiff against Alfonso Ruffin, Jennison-Wright Corporation and Ford. The complaint charged Ruffin with negligent operation of his dump truck and Jennison-Wright with negligence in allowing the wood blocks to be unloaded in a manner that it should have foreseen was dangerous to the plaintiff painting overhead. Ford was charged with negligence and in failing to provide a safe place of employment and in failing to warn those working at floor level of the work going on overhead or to take steps to avoid the simultaneous progress of the overhead painting and the floor laying in the same area of the plant.

After the trial had proceeded for two weeks, the plaintiff entered into an agreement with Jennison-Wright and Ruffin to dismiss the case as to them, the plaintiff covenanting to cease and desist from further suing those defendants in return for a total payment of $13,500 made

by them, but reserving all his rights against Ford. After overruling Ford's motion for judgment in its favor, the trial judge submitted the case to the jury, which returned a verdict of $13,500 against Ford, upon which judgment was entered. Subsequently Ford's motion for judgment notwithstanding the verdict or in the alternative for a new trial was overruled by the district court in a memorandum order.

In submitting the case to the jury, the trial judge instructed them that it was Ford's duty to comply with Sections 4101.11 and 4101.12 of the Ohio Revised Code. Those sections, which were read to the jury, provide as follows:

> "4101.11. Every employer shall furnish employment which is safe for the employees engaged therein, shall furnish a place of employment which shall be safe for the employees therein and for frequenters thereof, shall furnish and use safety devices and safeguards, shall adopt and use methods and processes, follow and obey orders, and prescribe hours of labor reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters."
>
> "4101.12. No employer shall require, permit, or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide, and use safety devices and safeguards, or fail to obey and follow orders or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe. No employer shall fail to do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees or frequenters. No such employer or other person shall construct, occupy, or maintain any place of employment that is not safe."

The trial judge further correctly instructed the jury that under these Code provisions Ford was not an insurer of the plaintiff's safety while on its premises, and that "The word 'safety' or 'safe,' as used in the statutes, means such freedom from danger to life, health, safety or welfare as the nature of the employment will reasonably permit." See Section 4101.01, Ohio Revised Code; *Bosjnak v. Superior Sheet Steel Co.*, 145 O. S. 538, 548-550 (1945).

The trial judge's conclusion that these Ohio Code sections imposed upon Ford a duty to provide the plaintiff with a safe place to work was thus summarized in the court's opinion denying Ford's motion for judgment or a new trial: "There is evidence that Ford had employees working in and about the area where the accident occurred,—guards, watchman, and others, preparing places for the storage and installation of Ford's equipment. Unless these Ohio statutes apply to 'frequenters' such as the plaintiff as an employee of a sub-contractor doing work under the reserved direction and control of Ford, they could have no present force in any given case.

"They would have no consequential application to employees of employer Ford since under the Workmen's Compensation Act of Ohio the Industrial Commission would make awards to injured employees of employer Ford without regard to compliance with the obligations of such statutes."

In the concrete application of the quoted statutory provisions to the facts at hand, the trial judge instructed the jury that Ford could properly be held liable only upon a single narrow theory. As summarized in the court's opinion overruling Ford's motion for judgment or a new trial, Ford's liability under the court's instructions was based solely upon the jury's finding that Ford "exercised its reserved control and direction by ordering two subcontractors to work in the same area one above the other; the floor layers on the ground, the painters of the automatic sprinkler system pipes overhead. Bringing these two sets of employees together in such manner was in

Ford's interest, to speed up the work for its own occupancy of the space."[2]

On this appeal Ford makes three separate contentions. First, it argues that Jennison-Wright and Ruffin were primarily liable and Ford was liable only secondarily, if at all, and that therefore when the plaintiff entered into covenants not to sue Jennison-Wright and Ruffin the plain-

---

[2] The instructions actually given to the jury with respect to this theory of liability were as follows:

"As it seems to me the question of Ford Motor Company's legal liability comes down to whether you believe the evidence before you that it, as the owner and occupier of the property, through its employees, having contractually reserved the right of control and coordination of the work of the contractors, and thus charged with furnishing a reasonably safe place to work, and of seeing to the reasonably safe coordination of the work of the various kinds of trades as it progressed,—failed in its duty to exercise ordinary care to the extent of foreseeing that having the floor layers work beneath the painters of the sprinkler pipes at the same time, as testified by Dean and Knorr, presented some degree or risk or hazard; and whether in such situation you believe from the evidence that Ford, in the exercise of due care through its responsible employees, should have given some warning or instruction to Long Painting Company's workmen, or should have seen to it that some safety measures were taken or adopted by it, or its subcontractors, respecting the dangers reasonably to be foreseen if ropes from the scaffold should hang too far down while the hoist truck was dumping blocks for flooring in the same area and at the same time.

"If you do so conclude, do you further believe or find from the evidence that such failure upon the part of Ford directly caused or directly contributed, jointly with negligence of Jennison-Wright and Ruffin, to the plaintiff's accident? If so, the Defendant Ford would be liable.

"Now, I do not say to you that because Ford retained control and direction of the work and its coordination that it was responsible for every negligent manner in which the subcontractors carried out their respective jobs, or that in all circumstances was responsible for the safety of subcontractors' employees. Ford's witnesses deny that they had anything to do with ordering or bringing the floor-layers and the painters together; they say that Ferguson, the prime contractor, had that responsibility and did so, in keeping with

(Continued on next page)

tiff was thereafter barred from proceeding against Ford. Next, Ford contends that Sections 4101.11 and 4101.12 of the Ohio Revised Code, which require an employer to keep his place of employment safe for employees and frequenters, imposed upon Ford no liability to the plaintiff in this case. Finally, Ford contends that the plaintiff had actual or constructive knowledge of all the conditions which combined to cause his injuries and was therefore

---

(Continued from preceding page)

its contract. And, of course, if you conclude that Ford had nothing to do with it and exercised no control or direction over such a situation as existed here, it cannot be held responsible.

"Your consideration and determination respecting Ford's fault as the cause of this accident is limited to the precise situation which I have submitted to you. It is your province to resolve the facts in evidence in the interest of determining the probable truth respecting Ford's liability in that situation."

The theory was repeated in somewhat different language, as follows:

"Was the Ford Company, through its Resident Engineer and other employees, at fault in failing to so coordinate the work in progress at the point of the accident when, in the exercise of ordinary care, they could, or should, have foreseen a potential hazard in painters using a tooth-pick plank, with surplus rope ends hanging down at the same place and time when men were dumping wood blocks from a hoist truck in preparation for laying the floor under the area where the Plaintiff and his fellow workers were painting the sprinkler pipes, and if so, was the Defendant Ford's failure in that respect the proximate or direct cause of the accident?

"To permit recovery in this case it is not essential that Defendant Ford's negligence be found to be the sole cause of the Plaintiff's injuries, but, if you find from the evidence that negligence of Ford, and negligence of Jennison-Wright's men and Ruffin, or either of them, jointly constituted the proximate or efficient cause of Tomlinson's injuries, the Defendant Ford may be held liable in such event for the negligence.

"However, if you find that Ford was negligent, but also conclude that the sole efficient cause of the accident was the intervening negligence of Jennison-Wright and Ruffin, or either of them, Ford would not be liable."

barred from asserting a claim against Ford as the owner of the property where those conditions existed and the injuries occurred.

As to the first argument, it is true as Ford contends that in Ohio the release of a tort feasor primarily liable ordinarily operates to release one secondarily liable, regardless of an attempt to reserve rights against the latter. *Hillyer v. City of East Cleveland*, 155 O. S. 552 (1951). See *Terry v. Memphis Stone and Gravel Company*, 222 F. (2d) 652 (6 Cir., 1955).

However, it is clear from the court's instructions that the theory on which this case was submitted to the jury was that Ford, if liable at all, was primarily liable as a joint tort feasor. The plaintiff did not contend and the trial judge nowhere implied that liability could be imposed upon Ford because of the negligence of Ruffin or Jennison-Wright under the doctrine of *respondeat superior*. It was conceded throughout the trial that the latter were without question independent contractors. Ford's liability was based upon its alleged independent negligence in directing that the painting and floor laying work proceed simultaneously, without taking any steps to warn against dangers implicit in the dual operation. Compare *Meyer v. The Cincinnati Street Ry. Co.*, 157 O. S. 38 (1952).

In Ohio an injured person's release of or covenant not to sue one or more joint tort feasors does not extinguish his right of recovery against remaining tort feasors, if an express reservation of the injured party's rights against the other tort feasors is made. *The Adams Express Co. v. Beckwith*, 100 O. S. 348 (1919). It follows that if the trial court was correct in the view that Ford was jointly and independently liable, if liable at all, it was also correct in concluding that Ford was not released from liability by the release of Jennison-Wright and Ruffin. The trial judge correctly instructed the jury of their duty to reduce their assessment of the plaintiff's damages by $13,500, the amount paid by Jennison-Wright and Ruffin. Under the theory of liability submitted to the jury, this

was the extent of the advantage to which Ford became entitled by the release of its alleged joint tort feasors.

It remains to be considered, however, whether the court was in error in submitting the question of Ford's liability to the jury at all.

In support of its argument that it was not an "employer" and that the site where the plaintiff was injured was not its "place of employment" which would make it liable to the plaintiff as a "frequenter" under the Ohio statutes in issue, Ford points out that none of its equipment, tools, or machinery had been or could have been moved into the precise area where the plaintiff was injured and that none of its employees customarily worked on the floor in the area where the accident happened, much less on a scaffold located in the roof trusses sixteen feet above the floor.

Ford places prime reliance upon the decision of this court in *Popowich v. American Steel and Wire Co.*, 13 F. (2d) 381 (1926). In that case the plaintiff was employed by an independent contractor which had a window washing contract with the defendant. While washing a window of the defendant's building, the plaintiff fell and was injured. He based his right to recover on the statutes here in issue, alleging that the defendant had failed to place hooks or iron rings in the outer casings of the window to which a safety belt could be fastened. In affirming the district court's judgment dismissing the complaint, this court's opinion stated, "It is not claimed that any employee of defendant was required to work at the place where plaintiff was injured or to engage in the kind of work that he was doing. * * * Place of employment means, we think, the place where some employee is required to work, either temporarily or permanently. To include other places would be to divert the purpose of the statute and impose upon an employer the duty of making safe a place for one who is not an employee nor a frequenter of a place used temporarily or permanently by employees. To extend the duty to a place of that kind would be an expansion of the statute beyond its intended remedial effect." 13 F. (2d),

at page 382. The reasoning of the *Popowich* case has recently been expressly approved by an Ohio Court of Appeals in a decision upon which Ford also relies. *Pare v. Gemco Eng. & Mfg. Co.*, 95 O. App. 141 (1953).

The plaintiff on the other hand points to the presence in the general area of plant guards, who were concededly employees of Ford, and he relies upon the reasoning of the district court in concluding that the statutes imposed a duty upon Ford as an employer under the circumstances of this case. Specifically, the plaintiff calls our attention to the decision of this court in *American Steel & Wire Co. v. Sieraski*, 119 F. (2d) 709 (1941). In that case an employee of an independent contractor received injuries resulting from a defective platform on the defendant-owner's premises. In concluding that the safety statutes imposed a duty upon the defendant in that case, this court pointed out that at the time the plaintiff was injured the defendant's own employees were concurrently using the very platform that was defective. 119 F. (2d), at page 710.

In short, the circumstances of the present case seem to bring it somewhere between the factual situations in the *Popowich* and *Sieraski* cases.

As we understand the decisions of the Ohio courts, however, it is not necessary to decide whether the trial judge was technically correct or incorrect in concluding that the statutes in question applied to the circumstances of this case. The simple fact seems to be that, at least with respect to "frequenters," the Ohio appellate courts have not regarded those statutes as exacting a duty substantially different from that imposed generally by Ohio law upon an owner of property towards an invitee. This conclusion has been reached after examining the following decisions, among others: *Bosjnak v. Superior Sheet Steel Co.*, 145 O. S. 538 (1945); *Wellman v. The East Ohio Gas Co.*, 160 O. S. 103 (1953); *Schwarz v. The General Electric Realty Corp., et al.*, 163 O. S. 354 (1955); *Hozian v. The Crucible Steel Casting Company*, 132 O. S. 453 (1937); *Davis v. Shutrump Co.*, 140 O. S. 89 (1952); *Giovinale v. Steel Corp.*, 151 O. S. 161, 171-172 (1949); *Pare v. Gemco*

Eng. & Mfg. Co., 95 O. App. 141 (1953); *Jackson v. Cin. Gas & Elec. Co.*, 70 O. App. 139 (1941); *McKee v. New Idea, Inc.*, 36 O. L. Abs. 563, 589, 591 (1942).[3] Our attention has been called to no case where an appellate court in Ohio has held that the statutes here involved either added to or detracted from the duty of exercising ordinary care which a property owner owes to an invitee. Similarly, this court's decision in the *Sieraski* case was bottomed alike upon the Ohio case law and statutes. 119 F. (2d), at 711.

These statutes were obviously enacted primarily for the benefit of employees. *Pare v. Gemco Eng. & Mfg. Co.*, 95 O. App. 141. They were rendered largely obsolete by the passage of the Ohio Workmen's Compensation Law. Perhaps for that reason they have received but scant recent attention from the Supreme Court of Ohio, except in the *Bosjnak* decision. 145 O. S. 538. Cf. *Ohio Automatic Sprinkler Co. v. Fender*, 108 O. S. 149 (1923). For example, although a large part of the Ohio Supreme Court's recent opinion in the *Schwarz* case, 163 O. S. 354, is devoted to distinguishing that case from the *Bosjnak* decision, *supra*, no point at all is made in that opinion of the fact that the safety statutes were relied upon in the earlier case and apparently not relied upon in the later one.[4]

We come then to a consideration of what standard of conduct the Supreme Court of Ohio has required of one in the defendant's position toward an employee of an

---

[3] The law of Ohio Supreme Court decisions since January, 1858, has been in the syllabus, written by the court (Rule IV, 94 O. S. ix; 5 O. S. v; cf. 6 O. S. iii). But we are enjoined to read the syllabus with reference to the facts and issues presented in each case. *Williamson Heater Co. v. Radich*, 128 O. S. 124 (1934). A per curiam opinion of the Ohio Supreme Court has the status of a syllabus. *Thackery v. Helfrich*, 123 O. S. 334 (1931). By contrast, the syllabus of an Ohio Court of Appeals decision has no special dignity and has been held inferior to its accompanying opinion. *Carruthers v. Kennedy*, 121 O. S. 8, 11 (1929).

[4] Although the Ohio Supreme Court, taking judicial notice of Ohio statutes, would presumably apply any that were relevant. *State, ex rel. v. Taggart*, 133 O. S. 382 (1938).

independent contractor working on his premises. The recent decisions of that court have dealt primarily with the extent of the owner's duty to warn of a defective or dangerous condition within the knowledge of the owner and neither known by nor obvious to the contractor's employee. *Schwarz v. The General Electric Realty Corp., et al.*, 163 O. S. 354 (1955); *Bosjnak v. Superior Sheet Steel Co.*, 145 O. S. 538 (1945); *Wellman v. The East Ohio Gas Co.*, 160 O. S. 103 (1953). It was likewise that aspect of the duty of ordinary care with which this court was concerned in the *Sieraski* case, where it was pointed out "that the platform was known by appellant but unknown by appellee to be dangerous and unsafe; and that appellant failed to warn appellee of such hazardous condition." 119 F. (2d), at 710.

If Ford's liability in the present case were based upon a failure to warn, the Ohio law would clearly require decision in Ford's favor. "Where the premises upon which construction work is to be performed by a contractor remains under the control of the principal employer while the work is in the course of performance, a servant of the contractor is an invitee and as such entitled to recover from the principal employer for any injury which he may sustain by reason of the abnormally dangerous condition of the premises, only if the principal employer has, and the servant has not, actual or constructive notice of the existence of such condition." *Davis v. Shutrump Co.*, 140 O. S. 89, Syl. 1 (1942). There was no hidden defect or danger here. That the work of laying the flooring was proceeding simultaneously with the overhead painting was a fact as obvious to the plaintiff as to Ford. Indeed, both the plaintiff and his foreman stated that they had observed the floor laying work in progress.

Not its failure to warn Tomlinson, however, but its affirmative action in arranging to have the floor laying and overhead painting proceed together was the basis of Ford's liability as submitted to the jury. As to that, the Ohio law is not so clear. Yet the decision of the Supreme Court of Ohio in *Schwarz v. The General Electric Realty*

Corp, et al., 163 O. S. 354, rendered after the present case was decided in the district court, directly points to the conclusion that Ford was entitled to judgment under the law of Ohio.

In that case the contractor's employee was injured when a crane with which he and fellow workers were unloading steel came in contact with an electric power line. The immediate cause of the accident was the negligence of one of the contractor's other employees. The plaintiff stated that he had not seen the wire and had not been warned of its potential danger. The court held that the defendant owner had performed its duty of exercising ordinary care by having previously warned the plaintiff's employer that the power line was energized.

In the present case, since the simultaneous progress of the painting and floor laying was obvious, there was as we have said no duty to warn the plaintiff of the situation, and therefore much of what is said in the *Schwarz* case is not here relevant.

But it clearly appears in the court's statement of the case in the *Schwarz* opinion that it was the defendant owner and occupier of the plant which had, through its resident engineer, "designated the unloading site" which was "directly under" the high-voltage power line. Moreover, it appears in the opinion that one of the errors complained of was the exclusion of additional evidence on this point, which the plaintiff would hardly have offered except as evidence of the defendant owner's negligence. The court rejected the contention tersely: "The plaintiff claims also that the trial court erred in excluding evidence offered by the plaintiff that defendant's agent had directed that the steel beams be unloaded in the area of the accident. This was not a controversial issue, and the evidence, if admitted, would have been merely cumulative. There was no prejudicial error in this respect." 163 O. S., at 360-361.

In the present case, as in the *Schwarz* case, the immediate cause of the accident was the negligence of employees of an independent contractor, over whom the

defendant exercised no such control of the method or manner of their work as to make it liable under the doctrine of *respondeat superior*. In the *Schwarz* case as in this the defendant owner had directed that the plaintiff's work be carried on in an area where an accident occurred which would not have occurred if the work had been carried on elsewhere on the premises. In the *Schwarz* case the accident occurred because of proximity to a high-tension wire. In the present case the accident occurred because of proximity to the floor laying operations. Ford was under a duty no greater than was the defendant in the *Schwarz* case to foresee that other employees of the independent contractor would be negligent. We conclude that Ford violated no duty to the plaintiff under the law of Ohio.

The judgment of the district court is set aside and the case is remanded for the entry of a judgment in favor of the defendant.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed February 11, 1956.)

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby set aside and the case is remanded to the District Court for the entry of a judgment in favor of the defendant.

ORDER OF THE COURT OF APPEALS DENYING REHEARING.

(Filed March 14, 1956.)

The petition for rehearing is denied.

Office - Supreme Court
JUN 18 19
HAROLD B. WILLEY

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1955.

No. [redacted] 117

WALLACE H. TOMLINSON,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for Writ of Certiorari.

JAMES A. BUTLER,
Bulkley Building,
Cleveland 15, Ohio,
Attorney for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-8647

INDEX.

Counter-Statement of Question Presented 1

Counter-Statement of Case 2

Argument 3

I. Ohio Law 3

II. Review on Certiorari 5

III. Conclusion 5

TABLE OF AUTHORITIES.

Cases.

Davis v. Shutrump & Sons Co., et al., 140 O. S. 89 (1942) 3

Schwarz v. General Electric Realty Corp., et al., 163 O. S. 354 (1955) 3

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1955.

No. 980.

WALLACE H. TOMLINSON,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari.

Respondent cannot accept the question presented as set forth in petition for writ of certiorari. Respondent herein rephrases the question.

COUNTER-STATEMENT OF QUESTION PRESENTED.

Is a landowner on whose premises a building is being constructed by an independent prime contractor and several independent subcontractors, liable for injuries to an employee of a subcontractor which result from the negligence of employees of another independent subcontractor, over whom defendant exercised no control of the method or manner of doing their work, simply because the landowner arranged to have the two subcontractors work in the same area at the same time, which condition was as obvious to the injured worker as to the landowner?

COUNTER-STATEMENT OF CASE.

Petitioner, a resident of Indiana, on the grounds of diversity of citizenship, invoked the jurisdiction of the U. S. District Court at Cleveland by filing complaint therein against respondent, Ford Motor Co., seeking damages for personal injuries.

Ford had let a prime contract to H. K. Ferguson Co. for the erection of the superstructure of a new engine plant being constructed at Cleveland. Ferguson, an independent contractor, had, in turn, let about 20 subcontracts to as many independent contractors representing the several trades in this project.

Petitioner was an employee of Long Painting Co., one of the independent contractors. His injury resulted from the negligent operation of a dump truck by employees of Jennison-Wright Co., a floor laying contractor. The truck brought in a load of wood blocks which were dumped as directed by employees of Jennison-Wright. To unload the blocks, the operator raised the dump body to its maximum height and moved the truck forward quickly. The truck passed under the scaffold on which petitioner was painting. The elevated body snagged a loop of rope which petitioner had allowed to hang below the scaffold. This pulled the scaffold down and caused petitioner to fall to the floor.

No Ford employee and no equipment or vehicle belonging to Ford were involved in the sequence of events leading to petitioner's injuries.

There was evidence to support a finding that Ford had arranged for the painting and floor laying operations to proceed simultaneously in the same area of the plant. The undisputed evidence showed that petitioner and his foreman knew the floor laying work was going on and had

noticed a dump truck in the area at least once, during the day and a half petitioner had been on the job before the accident.

The district judge, over the objection of Ford, submitted the case to the jury on the question of Ford's possible negligence by reason of the fact that there was conflicting testimony as to who had arranged for the painting and floor laying operations to proceed simultaneously in the same area of the plant.

The jury returned a verdict in favor of petitioner in the sum of $13,500 upon which judgment was entered. The Court of Appeals in conformity with applicable Ohio law set aside the judgment of the District Court and remanded the case to the District Court for the entry of judgment in favor of Ford. Thereafter, petitioner filed petition for rehearing which the Court of Appeals denied.

ARGUMENT.

Petitioner asks for the allowance of the writ contending that the judgment of the Court of Appeals is contrary to Ohio law and that the result is unjust.

OHIO LAW.

The Court of Appeals gave this case careful attention and long study. Its opinion, printed in the appendix to petition for writ of certiorari, covers 14 pages. The Court refers to all of the applicable Ohio decisions and analyzes a number of them, particularly *Davis v. Shutrump Co.*, 140 O. S. 89 (1942) and *Schwarz v. The General Electric Realty Corp., et al.*, 163 O. S. 354 (1955). The *Schwarz* case is the most recent decision of the Supreme Court of Ohio on this subject. The opinion was published in the interval between the conclusion of the trial of this case in

the District Court and the argument of this case in the Court of Appeals. Petitioner has cited no more recent case in his behalf. To the contrary, he apparently relies upon the very decisions studied by the Court of Appeals and found by that Court to require judgment in favor of respondent.

We quote the controlling conclusions from the Court of Appeals' opinion:

> "In the present case, since the simultaneous progress of the painting and floor laying was obvious, there was as we have said no duty to warn the plaintiff of the situation, and therefore much of what is said in the Schwarz case is not here relevant." * * *
>
> "In the present case, as in the Schwarz case, the immediate cause of the accident was the negligence of employees of an independent contractor, over whom the defendant exercised no such control of the method or manner of their work as to make it liable under the doctrine of respondeat superior. In the Schwarz case as in this the defendant owner had directed that the plaintiff's work be carried on in an area where an accident occurred which would not have occurred if the work had been carried on elsewhere on the premises. In the Schwarz case the accident occurred because of proximity to a high-tension wire. In the present case the accident occurred because of proximity to the floor laying operations. Ford was under a duty no greater than was the defendant in the Schwarz case to foresee that other employees of the independent contractor would be negligent. We conclude that Ford violated no duty to the plaintiff under the law of Ohio."

REVIEW ON CERTIORARI.

Rule 19, of the rules of the Supreme Court of the U. S., indicates the character of reasons which will be considered as grounds for review on certiorari. None of the reasons mentioned in Rule 19 is applicable to this case.

The judgment of the Court of Appeals is just and right. Petitioner has already recovered $13,500 for his injuries from Jennison-Wright and its truck driver, Alfonso Ruffin. Petitioner is not entitled to a second recovery from Ford, the landowner whose premises were being improved by a group of independent contractors.

CONCLUSION.

Respondent prays that petitioner's petition for writ of certiorari be denied.

Respectfully submitted,

JAMES A. BUTLER,

Attorney for Respondent,
Ford Motor Company.

June 18, 1956.